IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.741 OF 2007
IN
SPECIAL CIVIL SUIT NO.7 OF 2007

M/s.Vidarbh Mining Pvt.Ltd. ..Appellant
(Orig. Plaintiff)

Versus

1. M/s. Melatharu Mining Pvt.Ltd.

2. M.M.C. Commodities

3. Deccan Minerals Pvt.Ltd. .. Respondents
(Orig. Defendants)

Mr.Y.S.Jahagirdar for the Appellant
Mr.Walavalkar for Respondent Nos.1 and 2
Mr.Arif Bookwala with Mr.Vijay Pande for Respondent No.3

CORAM : S.R.SATHE,J.
DATED : 02/11/2007

ORAL ORDER :-

1. The Appellants-original Plaintiffs in Special Civil Suit No.7 of 2007 have preferred this appeal against the order passed below Exh-5 by the Court of Civil Judge, Senior Division, Orus, Sindhudurg whereby Plaintiff's application for temporary injunction restraining defendant Nos.1 and 2 from obstructing Plaintiffs in exercising their right to excavate iron ore as per the agreement dated 24/10/2006 out of the suit mine situated in 40.37 Hectares area of village Sateli, till the disposal of the suit and directing

defendant Nos.1 and 2 to remove their machinery from the suit mine was rejected. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'defendants'.

2. The brief facts giving rise to this appeal are as under :-

Plaintiff is a registered private limited company. They are dealing in business of excavating ore out of mines. They are having sister concern by name Gold Star Metal Solution Private Limited. Ore excavated by the Plaintiffs is sold through the Plaintiff's sister concern. The defendant No.3 M/s.Deccan Minerals Private Limited is also dealing in sale and purchase of iron ore excavated from the mines. They have acquired rights in respect excavating ore out of mines situated in Sindhudurg District and in particular village Sateli. As per their agreement with Government, the defendant No.3 has been permitted to do their business through different agencies.

3. On 24/10/2006, the defendant No.3 entered into ore raising agreement with Plaintiffs after accepting amount of Rs.1 Crore, 50 lakhs as deposit and gave right to the Plaintiffs to excavate ore out of the mine situated in 40.37 Hectares situated at village Sateli.

4. Prior to the execution of agreement in favour of Plaintiff, defendant No.3 had executed an agreement with defendant Nos.1 and 2 for ore raising in respect of the adjoining mine which was in the area of 52.12 Hectares of village Sateli. However, dispute had arisen between defendant Nos.1 and 2 and defendant No.3 in respect of the said mine. According to defendant Nos.1 and 2 some portion of the pit in the land out of 40.37 Hectares had collapsed and as a result of the same, there was difficulty for defendant Nos.1 and 2 in carrying out mining operations in the land admeasuring 52.12 which they had taken from defendant No.3. The said dispute was ultimately referred to the arbitrator and finally the matter was settled and MOU was drawn. As per the said MOU defendant Nos.1 and 2 were allowed to carry out rectification work of the collapsed pit out of land commonly known as 40.37 Hectares area. However, under the guise of carrying out the said repairs or rectification work of the collapsed pit,

defendant Nos. 1 and 2 started obstructing Plaintiffs in entering in the portion admeasuring 40.37 Hectares and carrying out excavation work/mining operations in the said area which was taken by them as per the agreement dated 24/10/2006. Hence, Plaintiffs filed the present suit for declaration that the award passed between defendant Nos.1, 2 and defendant No.3 is not binding on them and for mandatory injunction directing defendant Nos.1 and 2 to remove their heavy and light earth removing machinery out of the suit property and for permanent injunction restraining defendant Nos.1 and 2, obstructing Plaintiff in exercising their right of excavating iron ore out of the suit mine i.e.40.37 area.

5. Plaintiffs also filed temporary injunction application Exh-5 and prayed that defendant Nos.1 and 2 be restrained from obstructing Plaintiff's activity of excavating iron ore out of area 40.37 Hectares under the guise of carrying out rectification work of the collapsed pit, till the disposal of the suit.

6. Defendant Nos.1 and 2 filed their written statement and opposed the Plaintiff's suit and the temporary injunction application. They contended that

in view of the provisions of Section-42 of the Arbitration and Conciliation Act, 1996, the Civil Court has no jurisdiction to try the present suit. They also contended that they have in fact filed execution proceedings in the High Court for execution of the arbitral award. They further contended that Plaintiffs and defendant No.3 in collusion with each other with a view to defeat the claim of defendant Nos.1 and 2 in the execution proceedings filed by them, the present suit has been filed. According to them, defendant No.3 has in fact permitted them to excavate iron ore out of the mine admeasuring 40.37 situated at village Sateli. Plaintiffs were aware of the said right and inspite of the same they are alleging that they have entered into an agreement with defendant No.3. It was, therefore, contended that Plaintiffs are not entitled for any temporary injunction as prayed.

7. Defendant No.3 also filed their say and admitted that they have executed ore raising agreement in favour of Plaintiff on 26/10/2006. They contended that the fall of pit No.1 had occurred due to the negligence of the defendant Nos.1 and 2 in carrying out mining operations in the area 52.12. Besides this, the process that was adopted by defendant Nos.1 and 2 for

rectification of the said collapsed pit was also improper and unscientific. As a result of the same, there was further collapse out of pit No.2. According to defendant No.3 terms and conditions with regard to rights in respect of repairing pit No.1 have in fact come to an end and the first agreement for repairing pit No.1 is in fact frustrated. The defendant No.3 therefore contended that loss if any suffered by the Plaintiffs is due to negligence and the activities of defendant Nos.1 and 2 and defendant No.3 is not responsible for the same.

8. After hearing the arguments of both the learned Advocates and considering the material on record, the learned Trial Judge came to the conclusion that defendant No.3 has entered into an agreement with Plaintiffs for excavating ore out of mine situated in the area 40.37 Hectares. He also observed that Plaintiffs have been impleaded by the defendant Nos.1 and 2 in the execution proceedings and in view of the provisions of Section-42 of the Arbitration and Conciliation Act, the present suit is not maintainable. He also came to the conclusion that Plaintiffs have not approached the Court with clean hands and they have failed to make out any prima facie case and the balance

of convenience is also not in their favour. Naturally, he rejected the Plaintiff's application for temporary injunction.

9. Being aggrieved by the above mentioned order the Appellants have filed the present appeal. In this appeal before me, Shri Jahagirdar, learned Senior Advocate for the Plaintiffs has urged only 3 points. Firstly, he submitted that Plaintiffs are at this stage not at all claiming any relief in respect of the award but they are only seeking relief of restraining defendants from obstructing Plaintiffs in exercising their right of excavation of iron ore out of mine situated in 40.37 Hectares area and as such it can not be said that Civil Court has no jurisdiction to grant the said relief. Secondly, the learned Senior Advocate canvassed before me that there is nothing on record to show that defendant Nos.1 and 2 are having right of excavation of iron ore out of area 40.37 Hectares. All that they are having a right to carry out repairs or rectification work in respect of the collapsed pit No.1. Lastly, he submitted that Plaintiffs have made out a prima facie case to show that their right to excavate iron ore is being infringed or obstructed by defendant Nos.1 and 2 without any justifiable cause and

as such Plaintiffs have made out a prima facie case and as they have already parted with huge amount, if temporary injunction is not granted they would suffer irreparable loss. As against this, Shri Walavalkar, learned Senior Advocate for the defendant Nos.1 and 2 supported the order passed by the learned Trial Judge and submitted that the present suit is filed by defendant No.3 and Plaintiffs in collusion with each other and this is an attempt of defendant No.3 to restrain the defendant Nos.1 and 2 from carrying out their mining operations in mine situated in 52.12 Hectares area and 40.37 Hectares area. Secondly, he argued before me that Plaintiffs have entered into an agreement with defendant No.3 knowing full well that the suit mine is already given to defendant Nos.1 and 2 for excavation purposes. So, now it is not open for Plaintiffs to say that irreparable loss is being caused to them. He, therefore, submitted that the appeal be dismissed. Shri Bookwala, learned Advocate for the defendant No.3 submitted that defendant Nos.1 and 2 are now not even entitled to carry out mining operations in the area 52.12 Hectares. Besides this, the work regarding rectification of pit No.1 is already over and so far as fall of Pit No.2 is concerned the same was never a subject matter of the arbitration proceedings

and Plaintiffs are not having any right even to repair the said portion of Pit No.2.

10. It is not in dispute that the defendant No.3 has acquired from the Government the rights in respect of excavating iron ore out of the mines in question namely mines situated in 40.37 Hectares area and the mines situated in 52.12 Hectares area. It is also an admitted fact that earlier defendant No.3 had executed an agreement for ore raising in favour of defendant Nos.1 and 2 in respect of the mine situated in 52.12 Hectares area and some dispute had arisen between defendant Nos.1 and 2 and defendant No.3 in that behalf and ultimately, the matter was referred to the arbitrator and finally, it was settled. Plaintiffs have produced on record agreement executed by defendant No.3 in their favour in which the defendant No.3 has given right to excavate iron ore out of mine situated in 40.37 Hectares area to them. One thing is certain that Plaintiff's entire claim is based on the said agreement.

11. During the course of arguments, Shri Jahagirdar, learned Senior Advocate for the Plaintiffs submitted that Plaintiffs are in fact not having any

objection if defendant Nos. 1 and 2 want to carry out rectification of pit No.1 as agreed between defendant Nos.1 and 2 and defendant No.3. However, under the guise of carrying out the said repairs of the pit which is admittedly situated in area 40.37 in respect of which Plaintiffs have taken the right to excavate the iron ore, the defendant should not obstruct Plaintiffs either for entering the said 40.37 area or create any hurdle in carrying out the excavation or mining operation in the said 40.37 area. So, long as there is nothing on record to show that the agreement in question dated 24/10/2006 executed between defendant No.3 and Plaintiff is not bad in law and sham or bogus, it must be held that Plaintiffs are entitled to exercise their right which they have accrued under the agreement dated 24/10/2006. It was tried to be argued on behalf of the defendant Nos.1 and 2 that it is only with a view to defeat the claim of defendant Nos.1 and 2 the agreement dated 24/10/2006 has been executed. It was suggested that the said agreement even does not bear year because the date mentioned therein is only 24th October. It was, therefore, submitted that Plaintiff and defendant No.3 wanted to create fictitious document hurriedly and that is why even year is not mentioned in the said agreement. However, if we

peruse the stamp paper of the said agreement, it is very clear that it has been purchased on 18/10/2006. It is true that in the first paragraph when it is mentioned that the agreement is executed on a particular day, it is only mentioned '24th October'. However, we can not ignore the fact that some times due to oversight one forgets to mention year but that by itself is not sufficient to discard the said agreement particularly when there is ample material on record to show that the said agreement must have been executed on 24/10/2006. While considering this aspect, it is necessary to mention that defendant No.3 has executed one agreement for sale of iron ore with the sister concern of Plaintiff. The said agreement is filed at page No.69 in the compilation of the Plaintiffs. From xerox copy of the said agreement, it is very clear that the said agreement is executed on 24/10/2006. What is more to be noted is that at page-69 it is mentioned:-

> ***"AND WHEREAS by extraction agreement of even date made between M/s.Deccan and M/s. Vidharbha Minning Private Limited (present Plaintiff)."***

So, I have no hesitation to hold that the agreement in question is executed on 24/10/2006 and non mention of the year in the agreement in question will not make any difference while considering the present

appeal.

12. Shri Walavalkar, learned Advocate for the defendant Nos.1 and 2 strenuously argued before me that in the instant case defendant Nos.1 and 2 are not only having right in respect of carrying out rectification work of the fall of collapsed pit No.1 situated in area 40.37 but the defendant Nos.1 and 2 are in fact having a right to excavate the iron ore out of the said land or mine and they have actually accordingly taken out iron ore out of the said portion and sold it. However, it must be noted that there is absolutely no specific agreement executed between defendant No.3 and defendant Nos.1 and 2, hereby, it can be said that such right of excavation of iron ore has been given to the defendant Nos.1 and 2 in respect of 40.37 Hectares area. On the contrary, if we peruse the MOU dated 05/09/2005 and in particular clause-C then it is very clear that defendants are only allowed to enter the mine in the area 40.37 only for limited purpose of carrying out repairs or rectification process of fall out pit. This is evident from the following stipulation in the said MOU.

> ***"(c) It has been found that the aforesaid parties can not fulfill their respective terms and conditions mentioned in their respective agreements***

> ***noted hereinabove due to the fact that Pit No.1 of Sateli Mine 40.37 has collapsed recently, which is more particularly described and highlighted in green colour and disclosed in the map annexed and marked as Schedule-I, which is enclosed herewith and for the said purpose the party of the first part shall provide and give free access to the land adjoining the collapsed mine for its repairs and rectification as permissible under the Mining Rules and Laws to the party of the second part as the operation of Sateli Mine 52.12 Hectares has become physically not feasible and non-operable."***

Relying on one stray sentence in Clause-D of the said MOU, Shri Walavalkar, learned Senior Advocate argued before me that defendant Nos.1 and 2 have also taken right of excavation in respect of mine situated in 40.37. The said clause-D runs as follows :-

> ***"(d) To overcome the difficulties faced by all the parties because of collapsed mine referred to hereinabove the present Memorandum of Understanding has been executed to enable to smooth business and mining operations at Sateli Mine 52.12 and 40.37 Hectares on certain terms and conditions agreed and recorded hereinafter The Party of the First Part assures that it shall provide and give unhindered entry and exit to the Party of the Second Part for enabling it to repair the collapsed mine as its own costs and expenses."***

13. Even from this clause also it is very clear

that right of entry in the said portion was given for enabling defendant Nos.1 and 2 to carry out repairs of the collapsed mines and nothing more than that. Besides this, even in Clause-F of the said MOU it is mentioned that the defendant Nos.1 and 2 will obtain all requisite permission from statutory authorities to repair the collapsed Sateli Mine of 40.37. It is only when while carrying out repairs of the fall out portion if any iron ore is required to be removed out of that portion in the process of repairs the defendant Nos.1 and 2 were allowed to sale the said portion and that is obviously because expenses with regard to repairs were to be borne out by defendant Nos.1 and 2. So, merely because they were permitted to excavate certain iron portion and sale it, that would not be sufficient to hold that a substantive right of excavating iron ore out of the entire portion of 40.37 Hectares was given to defendant Nos.1 and 2. So, having regard to all these facts and circumstances and reading the MOU as a whole, I have absolutely no hesitation to hold that as it is, there is absolutely nothing on record to show that defendant Nos.1 and 2 are in fact having any legal right to excavate the iron ore out of the mine having area 40.37. However, it appears that the learned Trial Judge has not at all taken into consideration all these

documents and has simply observed that the suit is not tenable in view of the provisions of Section-42 of the Arbitration and Conciliation Act, 1996.

14. It is well settled that while considering nature of the suit and jurisdiction of the Court it is necessary to see what insubstance Plaintiff has prayed for. In the instant case, though, Plaintiffs have stated that it be declared that the award between defendant Nos.1 and 2 and defendant No.3 is not binding on them one can not jump to the conclusion that Plaintiffs are claiming in substance the relief in respect of the said award. In fact Plaintiff's entire claim is based on their own agreement dated 24/10/2006. It is only because defendant Nos.1 and 2 are trying to make a show that they are having right to excavate iron ore even out of mine having area 40.37, one is required to see the MOU, in order to find out whether there is any prima facie substance in the contentions taken by the defendant Nos.1 and 2. This Court is not at all entering into question as to whether MOU in question is legal, proper or it is in existence etc. While showing that Plaintiffs are not entitled for temporary injunction, defendants are trying to take shelter of MOU and hence, for that limited purpose this Court is

required to see whether on the basis of any of these stipulation in MOU defendant Nos.1 and 2 can obstruct Plaintiffs from exercising their legitimate right. So, under the circumstances, prima facie I am of the view that so far as Plaintiff's prayer for mandatory and temporary injunction is concerned the suit is maintainable in the Civil Court and the same can not be said to be barred by the provisions of Section-42 of the Arbitration Act.

15. Thus, from the above discussion, it is very clear that Plaintiffs have prima facie succeeded in showing that their legal right is being infringed without any just cause by the defendant Nos.1 and 2. If temporary injunction is not granted in favour of Plaintiffs then certainly they would not get return of the huge amount which they have kept as deposit with defendant No.3 and thus, they would suffer irreparable loss. As against this, even if temporary injunction is granted as against defendant Nos.1 and 2, they would not suffer any loss because they are not at all having any right to excavate iron ore out of the mine in 40.37 Hectares area. At the most they may be having only a right to enter the mine for the purpose of carrying out rectification work of Pit No.1. This Court is not even

now considering as to whether the stage of rectification is over because it has been submitted at Bar that Plaintiffs are not having objection to defendant Nos.1 and 2 to carry out repairs of Pit. Hence, I pass following order :-

O R D E R

The Appeal is allowed.

The order passed by the Trial Court rejecting Plaintiff's application Exh-5 is set aside.

Irrespective of the fact as to whether defendant Nos.1 and 2 are having any legal right to excavate iron ore out of mine in 52.12 Hectares area of village Sateli and are having right to carry out rectification work in respect of collapsed Pit No.1 and/or 2, under the guise of carrying out rectification work of collapsed pit, the defendant Nos.1 and 2 shall not obstruct Plaintiffs from entering and carrying out excavation operations in the remaining area of suit mine i.e. 40.37 Hectares of village Sateli, till the disposal of the suit.

As the exact area of the collapsed Pit No.1 is not on record the parties are at liberty to move the Trial Court for getting the said area demarcated and the extent of repairs that are required to be carried out, by getting the Commissioner appointed.

The Trial Court is directed to dispose of the suit on merits according to law, without getting influenced by the observations made in this order, as expeditiously as possible and in any event within 6 months from today.

Under the circumstances of the case, parties to bear their own costs of this appeal.

(S.R.SATHE,J.)